No. 79-881

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN N. MITCHELL, PETITIONER

v.

BERTRAM ZWEIBON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

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The petition in this case advised the Court that the three questions presented were identical to the questions of immunity and retroactivity presented in *Kissinger* v. *Halperin, cert. granted,* No. 79-880, (May 19, 1980), and it therefore suggested that the Court hold this case pending the decision in *Kissinger.* After the Court granted certiorari in *Kissinger,* however, we concluded that it was unnecessary in that case for the Court to reach any question of an independent immunity for the Attorney General, because of the close nexus between presidential directives and the particular conduct at issue in *Kissinger* (Br. 50 n.44). By contrast, this case and the companion case of *Mitchell* v. *Forsyth,* No. 79-1120, necessarily present the question of the independent

immunity of the Attorney General from personal damages liability for acting on behalf of the President to authorize electronic surveillance for national security purposes. Respondents in this case have filed a brief amicus curiae in *Kissinger* urging that an Attorney General is not entitled to an independent absolute immunity. This supplemental memorandum is submitted in further support of the petition and in response to that argument.

Respondents argue that the Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), precludes absolute immunity for an Attorney General in the absence of some element of presidential involvement (Amicus Br. 13-14). This reflects a fundamental misreading of the Court's opinion. Although *Economou* establishes a general rule that Executive Branch officials sued personally for alleged violation of constitutional rights are protected only by a qualified immunity, the Court expressly recognized that "there are some officials whose special functions require a full exemption from liability" and that there would be "exceptional situations where it [can be] demonstrated that absolute immunity is essential for the conduct of the public business" (438 U.S. at 507).[1] The responsibility of the Attorney General to assess and determine the state of the law and then

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[1] The Court in *Economou* (438 U.S. at 508-517) went on to hold that absolute immunity would be available for those executive functions that are analogous to judicial and quasi-judicial responsibilities. The courts of appeals have interpreted the Court's decision narrowly to hold that *only* those executive functions are protected by absolute immunity. See, *e.g.*, *Halperin* v. *Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979), cert. granted, No. 79-880 (May 19, 1980); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1214-1215 (3d Cir. 1979), petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980).

to take action required in the national interest in light of that determination is an aspect of the public business requiring the protection of absolute immunity. Indeed, these functions are closely analogous to those that the Court held were protected in *Butz* v. *Economou*, *supra*.

The Attorney General is the Executive Branch official to whom ultimate responsibility for authoritative interpretation of the law within that Branch has been assigned. See 28 U.S.C. 511-513. As this Court has recognized in approving absolute immunity for judges, interpreting the law is an extremely difficult function that requires a broad scope of discretion unimpeded by the threat of personal damages liability. See *Stump* v. *Sparkman*, 435 U.S. 349, 355 (1978); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871).[2] The necessity of protecting the unfettered exercise of this discretion by the Attorney General is particularly acute in the circumstances of this case, in which Fourth Amendment interests had to be balanced against inherent presidential powers under Article II of the Constitution in the absence of any clear judicial ruling. See *United States* v. *United States District Court*, 407 U.S. 297, 299 (1972) (resolution of the legal question "requir[es] sensitiv-

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[2] The argument advanced in the government's brief in *Kissinger* (at 49 & n.42), regarding the need for absolute immunity to allow the Attorney General to advise the President freely without fear of personal damages liability, applies with equal force to support an independent immunity to protect the functions exercised by the Attorney General in this case. In *Kissinger*, the Attorney General's function was to advise the President of the legality of a wire interception; here, it was the Attorney General's responsibility to take action to institute the wire interception, as well as to make the legal determination involved in *Kissinger*.

ity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.").[3]

The Attorney General cannot be constrained to act only when the lawful course is clearly established by judicial decision. Because the Attorney General (like a judge) is often called upon to give legal advice or make decisions in areas that are at the frontiers of the law, he necessarily risks exposure to retaliatory suits by those affected by his decision. See *Butz* v. *Economou*, *supra*, 438 U.S. at 510; *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976). A refusal to recognize an absolute immunity from damages liability as a result of this advice or decision-making would impose a serious burden on the effective conduct of the public business.

The Attorney General and the Department of Justice play a unique role in the administration of justice and the development of the law.[4] Because of the difficulty and novelty of the legal issues that confront

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[3] The constitutional issue becomes even more complex where foreign security concerns prompt an electronic surveillance. Although this Court has not yet considered this issue (compare *United States* v. *United States District Court*, *supra*, 407 U.S. at 309 n.8 with *id.* at 321-322), the court of appeals held for the first time in 1975 that the instant surveillance required prior judicial authorization (*Zweibon* v. *Mitchell*, 516 F.2d 594, 611-659 (D.C. Cir. 1975)).

[4] Among other duties, Congress has imposed upon the Attorney General the obligation to appear in litigation whenever an interest of the United States is involved (28 U.S.C. 517). See *Robinson* v. *Pottinger*, 376 F.Supp. 615, 619 (M.D.Ala. 1974), aff'd, 512 F.2d 775 (5th Cir. 1975) (suit against Assistant Attorney General for advising that proposed statute might be unconstitutional).

the Attorney General, it can be expected that courts will not always agree with his considered legal conclusions. But the court of appeals essentially held that each time the judiciary disagrees with the Attorney General's legal determination and an aggrieved party brings suit claiming malice or bad faith, the Attorney General must affirmatively establish his personal good faith in the performance of his office. Such a burden would be regarded as intolerable if imposed on the district courts or courts of appeals each time one of their decisions was set aside on appeal. See *Stump* v. *Sparkman*, *supra*, 435 U.S. at 359-360; *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 349. The burden can no more easily be borne by the Attorney General. Under the holding of this case, he must prove his good faith by testimony and evidence submitted in lawsuits brought (as here) years after the relevant events have transpired. And the Attorney General might have to explain to a lay jury why he elected one rather than another interpretation of a complex question of law. The imposition of this burden on the Attorney General "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967).

This case illustrates the risks inherent in requiring the Attorney General to establish the good faith and reasonableness of his legal determinations. Rather than commending petitioner for seeking advice from subordinates in the Department of Justice before reaching his own conclusions on a significant and unresolved legal question, both the court of appeals (Pet. App. 10a-11a) and the respondents in their *Kissinger* amicus brief (Amicus Br. 15-18) fault petitioner for choosing among the varied opinions of his Assistant Attorneys General and Solicitor Gen-

eral.[5] Thus, respondents would invite the spectacle of a jury's attempting to weigh the testimony of these officials in order to probe petitioner's motives in deciding as he did (see *Kissinger* Reply Br. 17 n.11). Moreover, the threat that this internal advisory process would be exposed to public scrutiny in litigation might lead subordinates to "temper candor with a concern for appearances and for their own interests" when their advice is sought, "to the detriment of the decisionmaking process" (*United States* v. *Nixon*, 418 U.S. 683, 705 (1974)). Such a result would discourage informed decision-making by the Attorney General in discharging his unique responsibilities.

Finally, according the Attorney General an absolute immunity from damages liability based on the exercise of his discretion to interpret the law and to act thereon would not mean that there are no checks on his exercise of that discretion. Like a prosecutor, the Attorney General "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler* v. *Pachtman*, 424 U.S. 409, 429 & n.30 (1976). Additionally, as a cabinet official and law officer, the Attorney General's decisions and actions are subjected to a number of checks within the Ex-

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[5] The advice is contained in memoranda to the Attorney General, which are included as an appendix to respondents' amicus brief in *Kissinger*. Because respondents have taken certain statements in the memoranda totally out of context, we would refer the Court to the memoranda themselves. Significantly, in no instance was petitioner advised that the type of foreign security surveillance involved in this case was unlawful under then-existing decisional law. See cases discussed at *Kissinger* Br. 56-57.

ecutive Branch, to congressional oversight, and to frequent judicial review.

In sum, although this Court previously has recognized that officials "cannot be expected to predict the future course of constitutional law" (*Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978), citing *Pierson* v. *Ray*, *supra*, 386 U.S. at 557), it is the Attorney General's statutory responsibility to do precisely that. Given the importance and difficulty of this task, the Attorney General should not be penalized for "mistakes in judgment, whether the mistake is one of law or fact" (*Butz* v. *Economou*, *supra*, 438 U.S. at 507). Absolute immunity to safeguard the Attorney General's ability to perform these responsibilities, therefore, is essential for the conduct of the office and in the public interest.

For these reasons, as well as those stated in the petition, if the disposition of this case is not governed by the Court's decision in *Kissinger*, the petition for a writ of certiorari should be granted.[6]

Respectfully submitted.

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[6] This conclusion applies as well to the pending petition in *Mitchell* v. *Forsyth*, No. 79-1120. In addition, regardless of the Court's disposition of the petition in No. 79-881, we believe that the cross-petition filed in No. 79-883 should be granted for the reasons stated in the memorandum for the respondent in that case.

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